

**BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION**

IN THE MATTER OF:

TRAVIS C. COX)
Petitioner,)
) SEAC NO. 07-13-058
vs.)
)
INDIANA DEPARTMENT OF)
CHILD SERVICES)
Respondent.)

NOTICE OF PROPOSED DISMISSAL UNDER I.C. 4-15-2.2-34, 42

On July 22, 2013, Petitioner Travis Cox, pro se, filed a request for administrative review with the State Employees' Appeals Commission ("SEAC") by the attached Complaint.¹ The filing begins a proceeding that is controlled by Ind. Code §§ 4-21.5 et seq. ("AOPA") and I.C. 4-15-2.2-1 et seq. (the "Civil Service System"). Petitioner Cox is a former state employee, a family case manager, for Respondent Indiana Department of Child Services ("DCS"). Petitioner challenges the fairness or just cause of his June, 2013 termination of state employment by Respondent DCS.

SEAC has an independent statutory obligation to assess its jurisdiction at the initial stage of the proceeding, and as a case might continue. I.C. 4-15-2.2-42(e). As a matter of law, the Complaint and legal authorities show that Petitioner Cox was still inside his working test period and could be summarily discharged by DCS.² Petitioner's argument that his working test period was already over by a few days is unpersuasive. Additionally, the incident which a week later led to the Petitioner's dismissal arose, in part, inside the working test period. This case should be dismissed under I.C. 4-15-2.2-34 and 42 as explained herein. The following additional findings of fact, conclusions of law, and notice of proposed order of dismissal are entered.

I. Working Test Period Analysis

This case presents SEAC with an opportunity to closely consider the scope of review in 'working test period' Civil Service cases. In part, this review must focus on the exact statutory language of Civil Service Section 34, governing working test periods. Certain applicable SPD Rules and Handbook provisions are also reviewed given the allegations in the Complaint.

¹ The State Personnel Department (SPD) number at Step II below was SPD No. 15379.

² For purposes of this initial jurisdictional review the facts of the Complaint are taken as true. However, a case should be dismissed when the law requires that result. *Meyers v. Meyers Construction*, 861 N.E.2d 704, 705-706 (Ind. 2007); *Huffman v. Office of Env'tl. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004)

In Petitioner Cox's view this employment termination dispute revolves around his taking of a personal leave day on June 10, 2013, and whether Petitioner gave a supervisor advance notice of that day off on June 7, 2013. (See Complaint.) Petitioner Cox alleges that he was only inside his working test period for DCS between about January 7, 2013 (hire date) and lasting until on or about June 7, 2013. In other words, Petitioner calculates his working test period as approximately six (6) months. Petitioner shows, by allegation and a DCS letter, that he was terminated effective June 12 or 13, 2013. (See Complaint, including the DCS 'working test' termination letter of June 11, 2013.)

Petitioner further contends that he was outside his working test period when he took a personal day on Monday, June 10, 2013, and therefore could not be summarily dismissed by DCS under I.C. 4-15-2.2-34. Petitioner also claims that he gave notice to his supervisor of the need or taking of a personal day on Friday, June 7, 2013 for June 10. (Id.) In summary, Petitioner Cox claims that the state was 'late' in ending his working test employment on June 12-13, 2013. Petitioner thus implies that he could only be terminated for just cause as a full classified employee outside a working test period.

DCS's ostensible reason for the termination was Petitioner's failure to inform a supervisor in advance of the use of a personal day on June 10, 2013. (See Complaint.) More generally, DCS' termination letter states Petitioner failed to complete the working test period to the agency's discretionary satisfaction under I.C. 4-15-2.2-19, 34 and 31 IAC 5-3-1, 5-12-3. A delegate of SPD's Director confirmed the working test period dismissal by denying the Petitioner's Step II Complaint in writing. (Id.)

I.C. 4-15-2.2-34 (emphasis added), entitled "**Classified service; work test period**", states in pertinent part:

- (a) Every person appointed to a classification in the state classified service shall complete a working test period while occupying a position in the classification. **The working test period begins immediately upon the person's appointment and continues until a time established by the director** [The Director of the State Personnel Department]...
- (b) Subject to subsection (c), **the appointing authority [Here DCS] may remove an employee for any reason at any time during the employee's working test period...**
- (c) [Relating to fraud – Irrelevant here]
- (d) Before the expiration of an employee's working test period, the appointing authority shall notify the director as to: (1) whether the services of the employee have been satisfactory; and (2) whether the appointing authority [DCS] will continue the employee's employment after the working test period ends...
- (e) **Sections 23 [classified service discipline] and 42 [Complaint Procedure] of this chapter do not apply to an employee who is removed during a working test period for the initial classification in the state classified service to which the employee is appointed.**

Section 34 unambiguously and plainly supports DCS's position that the original working test period was still ongoing when Petitioner Cox was fired.³ Specifically, Section 34 does not specify that a working test period is exactly six (6) month as Petitioner alleges. Instead Section 34 states: "The working test period begins immediately upon the person's appointment and continues until a time established by the director." I.C. 4-15-2.2-34(a). A working test period thus ends when the SPD Director and agency (DCS) either pass the employee onto the classified service or terminates the working test employment as unsuccessful. Section 34(b, d). The later clearly happened here. See Complaint attachments (DCS Termination Letter and SPD Step II denial). Therefore, Petitioner cannot successfully carry an appeal to SEAC under the clear terms of Section 34(e), and 42.⁴

Both the SPD's promulgated regulations/rules (the "SPD Rules") and the publicly available SPD Employee Handbook (the "Handbook"), support this result.⁵

The SPD Rules found at 31 IAC 5-3-1, entitled "Working test", state in pertinent part:

(b) All appointments and promotions in the state classified service, other than temporary and intermittent, shall be subject to a working test period. **The length of such working test period shall be a minimum of six (6) months.**

See 31 IAC 5-3-1(emphasis added).

The Handbook then further states in pertinent part:

WORKING TEST PERIOD IN THE STATE CLASSIFIED SERVICE

If you are appointed to a position in the state classified service, you must undergo a working test period each time you are appointed to a new classification for which you have not already successfully completed a working test period and upon rehire or reemployment. **The length of a working test period varies, but is generally as follows:**

- **Six months for full-time employees**
- One year for part-time employees working half time or more

³ "The first step in statutory interpretation is determining if the legislature has spoken clearly and unambiguously on the point in question. If a statute is clear on its face, no room exists for judicial construction. However, if ambiguity exists, it is then open to construction to affect the intent of the General Assembly. Where ambiguity exists, to help determine the framers' intent, we must consider the statute in its entirety...". *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 828-929 (Ind. 2011)(internal citations omitted). The cardinal rule of statutory interpretation is to ascertain the intent of the drafter by "giving effect to the ordinary and plain meaning of the language used." *Id.*

⁴ The sole possible exception under Section 34(f) does not apply in this case. Section 34(f) provides that when an already classified employee is promoted into another classified position, such an employee can only appeal a discharge or layoff from the new working test period. The Complaint does not present this situation.

⁵ A Handbook copy is publically available at the State Personnel Department's homepage: <http://www.in.gov/spd/2732.htm>. See, I.C. 4-21.5-3-26(f)(official notice thereof).

- 18 months for part-time employees working less than half-time

The working test period may be extended for the same amount of time as the original working test period(s) defined above.

The purpose of the working test period is to determine whether your abilities have been satisfactory and whether the appointing authority will continue your employment. If your employment is continued after successfully completing an initial working test period, then you attain rights to due process and just cause for suspension, demotion, or dismissal and access to the civil service complaint process to challenge those disciplinary actions. At least once during each working test period your appointing authority shall prepare a performance appraisal.

If you do not successfully complete the working test, one of three actions will be taken:

- Your working test period may be extended
- You may be returned to a different classification in which you previously completely a successful working test period or
- **You could be dismissed from employment.**

See Handbook, p. 43 (emphasis added)

According to the SPD Rules and Handbook the length of a working test period is at least six (6) months for new full time employees, but can be extended up to twelve (12) months purely at state discretion. As Cox was a full-time employee prior to the working test period, the six-month period could be extended to a year-long test period. Moreover, an employee must be expressly certified as completing the working test period by SPD and retained by the agency (DCS) to have classified status. Contrary to Petitioner's assertion, successful working test certification does not happen automatically. The time frames also vary, but the six month minimum for full time employees can be doubled at state discretion. See, I.C. 4-15-2.2-34(a-b), 31 IAC 5-3-1 and Handbook, p. 43. It was noted in the SPD's denial letter that the director had not yet certified the working test period. Similarly, DCS also declined to continue to employ Petitioner under Section 34(b,d). Petitioner Cox's dismissal was inside a year and prior to his becoming classified.

Finally, the disputed request for the personal day on June 7, 2013 admittedly fell within the Petitioner's version of the working test period. The mere fact that the personal day taken and the formal termination occurred during the next business week (June 10-13, 2013) does not save the Complaint. As explored above, the plain language of Section 34 of the Civil Service System, and also the SPD Rules or Handbook, did not restrict the working test period to exactly six (6) months. *Id.* Six months is the minimum, but SPD allows a period up to a year for full time employees.

It would be poor policy to allow an employee to escape a working test period merely because the alleged improper action or discipline arose on the last day of the working test period. Upon review of Section 34's plain language, the ALJ does not think

the General Assembly intended that result. Time and logic requires the state to have a reasonable period to either confirm or a working test period ‘successful completion’ or to discipline/discharge for an event or suspected non-performance at the very end of a given working test period. Here both DCS and SPD acted reasonably promptly and terminated the working test period the following week and again in the Complaint process. Section 34(e) is clear that SEAC may not review an original working test period discharge under Section 42, requiring dismissal.

II. Other Contentions in the Complaint

Petitioner Cox asserts he was not given a fair chance or proper supervision/training during the working test period. This is a subjective dispute beyond SEAC’s scope of review as applied here. How to supervise or train an employee during an working test period is up to DCS and/or SPD. See, I.C. 4-15-2.2-1 et seq. SEAC cannot review working test period discharges under Section 34(e) and 42.

SPD has promulgated rules under 31 IAC 5-3-1, and also given Handbook guidance, about how state agencies like DCS are to observe employees, conduct performance reviews and otherwise handle working test periods. Even if violated, as Petitioner might allege, this guidance does not create a cause of action before SEAC for two reasons. The first is the statute. I.C. 4-15-2.2-34(e) commands otherwise. The ALJ will not construe the SPD Rules to conflict with the statute when they can be given a more reasonable, harmonious construction. The second reason is that harmonious construction. The SPD Rules are best and plainly read to give state agencies and SPD discretion on how to conduct working test periods. See 31 IAC 5-3-1. For instance, agencies are to ‘closely observe’ employees on working test periods, try to find the best employment fit and to report back to SPD. The SPD Rules are best practices guidance – no explicit cause of appeal or complaint right is purported to be created.

Lastly, looking at other equitable considerations, the state did not sit on its rights or send ambiguous signals to Petitioner Cox at the end of the working test period. DCS outright terminated Petitioner in a detailed letter the following week of the six month period specifying that he had not successfully completed the working test period. Petitioner may well disagree with how DCS conducted the working test period (e.g. as to his training or supervision), but there is no allegation, nor showing, of extraordinary illegality or delay to undermine that the DCS was well within its legal prerogative to summarily end the working test arrangement.

III. Conclusions of Law and Order

From a review of the Complaint, Petitioner Cox does not establish a claim to SEAC’s statutory or subject matter jurisdiction recognized by I.C. 4-15-2.2-34, 42.

Petitioner Cox has **fifteen (15) days** from the date of this notice to file a motion or amended complaint requesting a final order of dismissal not be imposed. In such motion, Petitioner should specifically address the jurisdictional defect stated above by the

Administrative Law Judge for the dismissal. **Petitioner must legally explain or cure this identified defect.** Should Petitioner file a motion, Respondent DCS may respond thereto within fifteen (15) days of same. It is the Petitioner's burden of proof to cure the jurisdictional defect if possible, and show that SEAC has jurisdiction of this matter. I.C. 4-15-2.2.-42 (e) and (f).

Motions and pleadings should be filed with the Administrative Law Judge at the address shown below. As an alternative to the U.S. Mail, service may be made upon the Administrative Law Judge by facsimile copy. Parties are cautioned, however, that while service through the U.S. Mail may be perfected upon mailing, service by facsimile copy is perfected only upon actual receipt. The facsimile number is (317) 233-9372. A copy of each motion or pleading must also be served upon all parties of record or their attorneys/representatives. Parties are reminded not to contact the Administrative Law Judge without serving and including the other party(s) on a communication. Currently, the parties are as identified in the caption above.

If no appropriate motion or amended complaint is timely filed showing jurisdiction exists, the Administrative Law Judge will enter a final order of dismissal pursuant to I.C. 4-15-2.2-42(e), and I.C. 4-21.5-3-24(c).⁶

DATED: August 1, 2013



Hon. Aaron R. Raff
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A copy of the foregoing was sent to the following:

⁶Commission proceedings are additionally governed by the Administrative Orders and Procedures Act (AOPA), I.C. 4-21.5 et seq. See I.C. 4-15-1.5-6(1). Accordingly the Commission has delegated to its Administrative Law Judges pursuant to I.C. 4-21.5-3-28 of the AOPA, the authority to issue final orders in this class of proceedings. The final order entered by the Administrative Law Judge for this class of proceeding shall be considered a final order under I.C. 4-21.5-3-27, pursuant to this delegation.

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